NOS. 22169 and 22169-A

United States
COURT OF APPEALS
for the Ninth Circuit

No. 22169

LANE-COOS-CURRY-DOUGLAS COUNTIES BUILDING AND CONSTRUCTION TRADES COUNCIL, AFL-CIO,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

No. 22169-A

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

v.

JENS HORSTRUP,

Respondent.

Case No. 22169 on Petition for Review of an Order of the National Labor Relations Board

Case No. 22169-A on Petition for Enforcement of an Order of the National Labor Relations Board

PETITIONER'S OPENING BRIEF IN CASE NO. 22169

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SUBJECT INDEX

TABLE OF AUTHORITIES

Page

Cases Cited

TABLE OF AUTHORITIES (Cont.)

STATUTES

TABLE OF AUTHORITIES (Cont.)

MISCELLANEOUS

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JURISDICTION

Case No. 22169 is before the Court upon the petition of the Lane-Coos-Curry-Douglas Counties Build-

ing and Construction Trades Council, pursuant to Sec. 10(f) of the Labor-Management Relations Act, as amended (29 U.S.C. § 169(f)), for review of the decision of the National Labor Relations Board finding a violation of Section 8(b)(7)(A) of the Labor-Management Relations Act, as amended (29 U.S.C. § 158(b)(7)(A)). The petitioner is an aggrieved party under Sec. 10(f) (29 U.S.C. § 160(f)).

The General Counsel of the National Labor Relations Board has petitioned, pursuant to Sec. 10(e) of the Labor-Management Relations Act, as amended (29 U.S.C. § 160(e)), in case number 22169-A, for enforcement of the order of the National Labor Relations Board against Jens Horstrup, a party respondent to the original proceedings herein. Attorneys for the petitioner in Case No. 22169 also represent respondent Horstrup in Case No. 22169-A.

R. A. Chambers & Associates, the charging party herein, is an employer within the meaning of Sec 2 (2) of the Labor-Management Relations Act, as amended (29 U.S.C. 152(2)), and engaged in commerce within the meaning of Secs. 2(6) and 2(7) (29 U.S.C. §§ 152(6) and 152(7)). (Cr. 5, 12, 33). The petitioner, Lane-Coos-Curry-Douglas Counties Building and Construction Trades Council, is a labor organization within the meaning of Sec. 2(5) of the Labor-Management Relations Act, as amended (29 U.S.C. § 152(5)) (Cr. 5, 13, 33). No issue of the National Labor Relations Board's jurisdiction is presented.

STATEMENT OF THE CASE

The charging party, R. A. Chambers & Associates (hereinafter Chambers) is an employer functioning as a general contractor in the building and construction industry in the vicinity of Eugene, Oregon (Tr. 22-25).[1] Approximately 60% of the work performed by Chambers is done through subcontractors or by means other than the use of Chambers' own employees (Tr. 117). Except in isolated cases, Chambers directly employs only carpenters and laborers (Tr. 117-118). Furthermore, many of these are not employed on a permanent basis, but work and then are laid off according to how many are needed for a particular job (Tr. 121-122).

The Lane-Coos-Curry-Douglas Counties Building and Construction Trades Council (hereinafter Council), petitioner before this Court, is a labor organization (Cr. 13, 33) whose membership consists of various affiliated local building trades unions (Tr. 10, 152, G.C. Ex. 17). Membership is not extended to any individuals or employees of any employer (Tr. 152). The purpose of the Council is to coordinate the activities of its affiliated local craft unions and promote jurisdictional harmony between them (Tr. 9). The Council also works to obtain execution by general contractors of its Building Trades Articles of Agreement (Tr. 9, G.C. Ex. 18). The Articles of Agreement are designed solely to regulate the relationship

[1] Tr. refers to Reporter's Transcript. Cr. refers to Clerk's record of pleadings. See Appendix B, infra, p. 37 for offer, identification and receipt of exhiibts.

between signatory general contractors and subcontractors with whom they contract regarding the terms and conditions of subcontracting (see Paragraph IV, G.C. Ex. 18).

In 1956, Chambers executed Building Trades Articles of Agreement with the Council (Resp. Ex. 4), similar to the agreement (G.C. Ex. 18) currently in use (Tr. 16). This agreement could only be terminated by written notice at least thirty days prior to November 29 of any given year (see Preamble to Resp. Ex. 4). Chambers first gave such written notice by letter dated February 4, 1965 (Tr. 58-59, G.C. Ex. 3). This was the only notice received by the Council (Tr. 155). More than once during the duration of the contract, problems arose concerning its enforcement (Tr. 39). Chambers was definitely of the impression that the contract would continue in full force and effect unless written notice of termination was given (Tr. 59).

Early in 1965, Chambers purportedly assigned all of its bargaining rights to the Eugene Contractors Association regarding negotiations with local craft unions. Between January 1, 1965 and July 21, 1965, Chambers allegedly became a signatory to collective bargaining agreements with four craft unions (carpenters, laborors, cement masons, and iron workers) by virtue of the Eugene Contractors Association having executed contracts with those labor organizations (Cr. 14).

Subsequently, on November 24, 1965 (Tr. 39),

Chambers was informed by the Council that its Building Trades Agreement would expire on November 29, 1965 (Tr. 42). Chambers was also requested to execute a new Building Trades Agreement (G.C. Ex. 18) at that same time. Chambers would not agree to the execution of a new agreement, and on April 13, 1966, Robert Gardner, construction superintendent of Chambers (Tr. 103), was informed that picketing would commence if new articles of agreement (G.C. Ex. 18) were not executed (Tr. 104-105). The picketing here in question then began on April 14, 1966 (Tr. 102). The picketing terminated on April 21, 1966 (Tr. 108).

The Eugene Contractors Association, on behalf of Chambers, filed an unfair labor practice charge against the Council on April 15, 1966 (Cr. 3). Following issuance of a complaint and conduct of a hearing on the matter, the Trial Examiner issued a decision on January 6, 1967, finding that the Council's picketing violated Sec. 8(b)(7)(A) of the Labor-Management Relations Act, as amended (29 U.S.C. § 158(b)(7)(A)) (Cr. 12-19). The National Labor Relations Board, in its decision and order dated June 19, 1967, affirmed this finding of the Trial Examiner (Cr. 33-35). From the Board's decision and order, the petitioner, Lane-Coos-Curry-Douglas Counties Building and Construction Trades Council prosecutes this appeal.

STATUTES INVOLVED

The following statutory provisions (set out in full, Appendix A, infra, pp. 33-36) are involved:

Sec. 8(b)(7)(A) of the Labor-Management Relations Act, as amended (29 U.S.C. § 158(b)(7)(A)).

Sec. 8(e) of the Labor-Management Relations Act, as amended (29 U.S.C. § 158(e)).

Sec. 8(f) of the Labor-Management Relations Act, as amended (29 U.S.C. § 158(f)).

Sec. 9(c) of the Labor-Management Relations Act, as amended (29 U.S.C. § 159(c)).

QUESTIONS PRESENTED

Each question presented by this appeal was raised before the National Labor Relations Board.

1. Will the National Labor Relations Board be allowed to completely reverse the historically recognized pattern of labor relations and negotiations in the building and construction industry involving building trades councils such as the petitioner herein?

2. Has picketing by the Lane-Coos-Curry-Douglas Counties Building and Construction Trades Council violated Sec. 8(b)(7)(A) of the Labor-Management Relations Act, as amended (29 U.S.C. § 158(b)(7)(A))?

   a. Did picketing by the Lane-Coos-Curry-Douglas Counties Building and Construction Trades Council have as an object forcing or re-

quiring R. A. Chambers & Associates to recognize or bargain with a labor organization as the representative of its employees, or forcing or requiring its employees to accept or select a labor organization as their collective bargaining representative?

b. Had R. A. Chambers & Associates lawfully recognized another labor organization as the representative of its employees?

c. Could a question concerning representation appropriately be raised under Sec. 9(c) of the Labor-Management Relations Act, as amended (29 U.S.C. § 159(c))?

SPECIFICATIONS OF ERROR

The Trial Examiner and National Labor Relations Board erred in their findings of fact, conclusions of law and entry of order, insofar as they determined:

1. That picketing by Lane-Coos-Curry-Douglas Counties Building and Construction Trades Council had as an object forcing or requiring R. A. Chambers & Associates to recognize or bargain with a labor organization as the representative of its employees, or forcing or requiring its employees to accept or select a labor organization as their collective bargaining representative.

2. That R. A. Chambers & Associates had lawfully recognized another labor organization as the representative of its employees.

3. That a question concerning representation could not appropriately be raised by the Lane-Coos-Curry-Douglas Counties Building and Construction Trades Council under Sec. 9(c) of the Labor-Management Relations Act, as amended (29 U.S.C. Sec. 159(c)).

4. That picketing by the Lane-Coos-Curry-Douglas Counties Building and Construction Trades Council violated Sec. 8(b)(7)(A) of the Labor-Management Relations Act, as amended (29 U.S.C. § 158 (b)(7)(A)).

SUMMARY OF ARGUMENT

1

The decisions of the Trial Examiner and National Labor Relations Board had the effect of completely reversing the historically recognized course of labor relations and negotiations in the building and construction industry. Their findings and orders holding that picketing by the Lane-Coos-Curry-Douglas Counties Building and Construction Trades Council violated Sec. 8(b)(7)(A) of the Labor-Management Relations Act, as amended (29 U.S.C. § 158(b)(7)(A)) clearly go beyond the scope of legislative intent in enacting that provision, compelling reversal by this Court.

2

Before picketing by a labor organization constitutes an unfair labor practice under Sec. 8(b)(7)(A) (29 U.S.C. § 158(b)(7)(A)), there must exist:

1. An object of organization or recognition by

that labor organization as a bargaining representative;

2. Lawful recognition of another labor organization by the employer; and

3. A situation where a question concerning representation cannot appropriately be raised under Sec. 9(c) of the Labor-Management Relations Act, as amended (29 U.S.C. § 159(c)).

The picketing in this case did not have an object of recognition or organization. Its sole purpose was to compel execution by R. A. Chambers & Associates of a subcontractor-oriented building trades agreement designed exclusively to regulate and govern the relationships between R. A. Chambers & Associates and other employers to whom it subcontracted work. The building trades agreement requires only that each subcontractor employed have executed current collective bargaining agreements with the local craft unions having jurisdiction of the work performed by the subcontractor's employees. The agreement provides expressly for the sanctity of local craft union agreements and in no way attempts nor is it intended to govern the relationships of any employer with his own employees. Furthermore, this subcontractor-oriented agreement is expressly permitted and made lawful by the construction industry proviso to Sec. 8(e) of the Labor-Management Relations Act, as amended (29 U.S.C. § 158(e)). Congress did not intend to make unlawful by Sec. 8(b)(7)(A) (29 U.S.C. § 158(b)(7)(A)) what it expressly made lawful in Sec. 8(e) (29 U.S.C. § 158(e)).

In any event, and regardless of the object of the picketing here in question, at the time R. A. Chambers & Associates executed collective bargaining agreements in 1965 with various local craft unions, it was already bound to a building trades agreement executed in 1956 with the petitioning Council. Therefore, execution of those new agreements constituted unfair labor practices under Secs. 8(a)(1) and 8(a)(5) of the Labor-Management Relations Act, as amended (29 U.S.C. §§ 158(a)(1) and 158(a)(5)), and resulted in unlawful recognition of other labor organizations by R. A. Chambers & Associates.

Finally, at the time R. A. Chambers & Associates executed its agreements with local craft unions, the majority status of its employees as union members had not been stablished. Therefore, these craft union contracts constituted pre-hire agreements made lawful only by virtue of Sec. 8(f) of the Labor-Management Relations Act, as amended (29 U.S.C. § 158 (f)). Sec. 8(f) expressly provides that such pre-hire agreements are not a bar to a petition for a hearing and election under Sec. 9(c) of the Labor-Management Relations Act, as amended (29 U.S.C. 159(c)). A question concerning representation could appropriately be raised by the petitioning Council.

The National Labor Relations Board, having failed to show the existence of any one of the three elements required before a violation of Sec. 8(b)(7)(A) (29 U.S.C. § 158(b)(7)(A)) may be found, improperly ruled that picketing by the Lane-Coos-Curry-Douglas Counties Building and Construction Trades

Council was an unfair labor practice under Sec. 8(b)(7)(A).

ARGUMENT

This case presents the underlying policy issue of whether the National Labor Relations Board will be allowed to completely alter the historical course of labor relations and negotiations in the building and construction industry. The question is of vital concern to building and construction trades unions throughout the entire country.

For many years after passage of the Wagner Act, the National Labor Relations Board (hereinafter Board) did not concern itself with the building construction industry. The Board's reasoning in not passing upon matters involving the building construction industry was based on the fact that this industry had peculiarities of its own. In fact, it was not until around 1949 (See for example Denver Building and Construction Trades Council, 82 NLRB 1195, 23 LRRM 1656 (1949)), that the Board did take cognizance of a case in this industry. The building and construction industry historically has had a different type of employer-employee relationship than any other.

In industrial-type employment, employees' jobs are substantially permanent. That is to say, they are employed by an employer and continue to stay in his employ for months, years and sometimes for a lifetime. This has never been true in the construction industry.

Construction unions have maintained a source of employment by establishing hiring halls. Employers in the construction industry have utilized these floating craft unionists for employment when needed in the course of building. This has established short-term employment, sometimes merely for days, and, for the most, for months. It has only been on large construction jobs such as a dam that an employee in the construction industry has worked in excess of a year. For these reasons, it has been impracticable to apply all the rules of the Wagner Act and its successor, the Taft-Hartley Act, to the building construction industry.

The general contractor in this industry usually signs a contract for an entire project and then either subcontracts all of the project or at least the so-called subcraft union work to subcontractors. At most, the general contractor usually has only employed laborers for foundation work and other incidental work in the project, carpenters for framing and other forming work, iron workers if steel is used, hoisting and portable engineers to move heavy material and teamsters for transportation. All other work to be done on such projects has then been subbed out.

In labor management relations, the employers, either individually or through associations, have negotiated traditionally with the four or five basic crafts, to-wit: carpenters, laborers, iron workers, hoisting and portable engineers and teamsters. Building and construction trades councils, which take into affiliation all crafts basically engaged in the construction

industry including the aforementioned five (with the present exclusion of the teamsters), include the subcrafts and as such have entered into contracts historically with general contractors and/or their associations establishing contract rights for all subcrafts. This has established an orderly method for handling the problems that arise. Rather than requiring negotiations with some thirteen or fourteen subcrafts, one contract does it all. This is the type of contract involved in these proceedings.

For years, local building and construction trades unions in Southwest Oregon have affiliated themselves with the petitioner, Lane-Coos-Curry-Douglas Counties Building and Construction Trades Council (hereinafter Council), which in turn is affiliated with the Oregon State Building and Construction Trades Council. During this time, the Council has negotiated building trades agreements with general contractors throughout the area. These agreements (G. C. Ex. 18) are not intended to require recognition of the Council nor are they intended to encompass bargaining on the wages, hours and working conditions of employees employed by the signatory contractors. The single purpose behind these agreements is to provide an orderly procedure for the contracting and subcontracting of work by these signatory contractors on a basis that is fair to workmen in all of the building and construction trades crafts, as well as to the contractor's competitors. Because a general contractor has complete control over an entire building project, the policy of the building trades unions,

through their affiliation with the Council and its execution of these agreements with various contractors, is to place on the general contractor the obligation of dealing only with subcontractors who have executed current working agreements with appropriate craft unions having jurisdiction of the work performed by their employees. These subcontractor-oriented agreements never were and are not now intended to deal with the general contractor's relations with his own employees. Rather, they are intended only to deal with his contracting and subcontracting of work and thereby his relations with other employers in the building and construction industry. As described above, this is the typical situation or procedure of building and construction trades unions throughout the country.

The effect of the decisions by the Trial Examiner and the Board in the instant case is to completely reverse and condemn this recognized and time-honored procedure used to coordinate and control the activities of the various building trades unions. The ruling has no basis whatever in the history of labor relations concerning the building and construction industry, and unequivocally goes beyond the intent of Congress in enacting Sec. 8(b)(7) of the Labor-Management Relations Act (29 U.S.C. § 158(b)(7)). Therefore, it is incumbent on this Court to reverse the Board's decision and hold that the Council's picketing did not constitute an unfair labor practice under Sec. 8(b)(7)(A) of the Labor-Management Relations Act (29 U.S.C. § 158(b)(7)(A)), *Grain Elevator, Local* 418 v. *NLRB*, 376 F.2d 774, 781 (D.C. Cir. 1967).

Picketing by the Lane-Coos-Curry-Douglas Counties Building and Construction Trades Council was Outside the Scope of Sec. 8(b)(7)(A) of the Labor-Management Relations Act, as Amended (29 U.S.C. Sec. 158(b)(7)(A)).

In order to sustain its position that the petitioning Council has engaged in picketing violating Sec. 8(b)(7)(A) of the Labor-Management Relations Act, as amended (29 U.S.C. § 158(b)(7)(A)), the Board must have established:

1. That picketing by the Council had as an object forcing or requiring R. A. Chambers & Associates (hereinafter Chambers) to recognize or bargain with, accept or select the Council as the collective bargaining representative of its employees;

2. That Chambers had lawfully recognized another labor organization; and

3. That a question concerning representation could not appropriately be raised under Sec. 9(c) of the Labor-Management Relations Act, as amended (29 U.S.C. § 159 (c)), *NLRB* v. *Local* 3, *IBEW*, 362 F.2d 232 (2d Cir. 1966); Local 627 Meat Cutters, 163 NLRB No. 65, 64 LRRM 1374 (1967).

The Board has failed to meet this burden on all three counts.

(A) Forcing or requiring that Chambers bargain with or recognize, accept, or select the Council as bargaining representative of its employees was not an object of the Council's picketing.

The Council is an organization whose membership

is made up exclusively of local craft unions in the building and construction industry (Tr. 10, 152, G.C. Ex. 17), and which deals only with employers in that industry (Tr. 153). The Council's sole purpose is to coordinate the activities of its various union affiliates (Tr. 147-148) including the handling of problems involved with the contracting and subcontracting of work by general contractors (see Resp. Ex. 4 and G. C. Ex. 18). The Council does not take into membership any individuals or employees of any organization or employer (Tr. 148, 152). No representation is made that the Council is seeking to represent the employees of any employer (Tr. 148), and the Council has never negotiated with an employer over the wages, hours or working conditions of his employees. No National Labor Relations Board election has ever been held in conjunction with a contractor's execution of the Council's Articles of Agreement (Tr. 153).

Picketing conducted at Chambers' construction site was for the sole purpose of obtaining Chambers' execution of the Oregon State Building and Construction Trades Council's Articles of Agreement (G. C. Ex. 18). These Articles of Agreement are designed exclusively to affect the relationship of a general contractor with his or its subcontractors (see preamble to G. C. Ex. 18) and in no way affect the relationship of the general contractor with his own employees or the relationships of subcontractors with their own employees. Quite to the contrary, the Articles of Agreement expressly provide for the sanctity of the agreements of the various local craft unions as regards the general contrac-

tor's relations with his or its own employees regarding matters of wages, hours and working conditions (see paragraphs I and II, G. C. Ex. 18). The only purpose of the Articles of Agreement is to obtain from general contractors an obligation to place in every contract or subcontract they make with another employer a provision that any work performed by the contractor or subcontractor coming within the jurisdiction of a craft union affiliated with the Council will be performed pursuant to an executed and current agreement with that local craft union (see paragraph IV, G. C. Ex. 18).

The decision of the Trial Examiner, added to and affirmed by the Board, indicates that they both entirely misconceive the scope and nature of the provisions of the Articles of Agreement. The Board's conclusion that the Articles of Agreement seek recognition for the Council as a bargaining agent simply because the provisions therein concerning contracting and subcontracting of work duplicate language contained in local crafts agreements to which Chambers is already a party (Cr. 33-34), is clearly erroneous. This analysis completely ignores the elementary fact that the Articles of Agreement deal exclusively with the relationship between Chambers and its subcontractors, while the local craft agreements which Chambers has executed concern relationships with its own employees, an entirely separate and unrelated matter. The local craft union activity is primary, seeking representation of Chambers' employees as a bargaining agent. The Council's activity is

secondary, seeking only to regulate the relationship between Chambers and other employers, in no way qualifying the relationship Chambers maintains with its own employees through negotiation and agreement with local building trades unions representing those employees.

This distinction between "primary" and "secondary" activity has long been recognized as in the case of *Fibreboard Paper Products Corp.* v. *NLRB*, 379 U.S. 203, 85 S. Ct. 441 (1964), where the Supreme Court defined as "primary" that activity affecting the relationships between an employer and his employees, and "secondary" that activity affecting relationships between several employers.

Viewing the matter in a slightly different light, the mere fact that picketing by the Council for a subject or demand (contracting and subcontracting clause) which could be and was lawfully negotiated between Chambers and the bargaining representative of its employees does not mean *per se* that the Council was seeking recognition as the bargaining agent of those employees. Such picketing can take place and yet not violate or be proscribed by Sec. 8(b)(7) of the Labor-Management Relations Act, as amended (29 U.S.C. § 158(b)(7)), *Blinne Construction Co.*, 135 NLRB 1153, 49 LRRM 1638 (1962).

Likewise, the Trial Examiner's analysis of the terms and provisions of the Articles of Agreement (G. C. Ex. 18) make it clear that he was either unable to accept or did not understand the nature and purpose

of such a building trades agreement. The Trial Examiner contends that Paragraph VII of the Articles of Agreement (G. C. Ex. 18) would in effect nullify a no-strike or arbitration clause in a local craft union agreement (Cr. 16). Paragraph VII, by stating that local agreements respecting these matters shall not be binding on the Council, has, in fact, exactly the opposite effect. The intent of this paragraph is to insure that the Council is clearly removed from craft union contractor disputes involving local collective bargaining contracts. It is the express intent of the Council not to interject itself into matters involving employer-employee disputes between Chambers and those it employs. The Council is only concerned with matters involving contractors such as Chambers and their dealings with other employers on a contractor or subcontractor basis.

Secondly, the Trial Examiner contends that Paragraph IX of the Articles of Agreement (G. C. Ex. 18) would modify the exclusive hiring hall provisions of the various local craft union agreements (Cr. 16). Article IX states that:

> ". . . In the event that any Employer, Developer and/or Owner-Builder, contractor or subcontractor is placed on the unfair list, it shall not be a violation of this Agreement for any employee to refuse to perform any work or enter upon the premises of the said Employer, Developer and/or Owner-Builder, . . ."

This paragraph makes reference only to violations of the Articles of Agreement themselves and in no

way attempts to govern or modify the terms of local craft agreements or what activity will constitute a violation of the latter.

Finally, the Trial Examiner contends that Paragraph X of the Articles of Agreement (see Cr. 34, footnote 1, for fact that Trial Examiner inadvertently referred to Paragraph X as Paragraph XI) requires that Chambers bargain with the Council before modifications in the wages, hours and working conditions of his employees may be negotiated with the appropriate local craft union. Paragraph X simply states that the Articles of Agreement themselves cannot be amended without the approval of the Council. On the other hand, the Articles of Agreement expressly contemplate that any work by Chambers' employees will be performed according to an executed current agreement and subsequent agreements entered into with the local craft union having jurisdiction of the work involved (see Paragraph II). The Council expressly disaffirms any interest or participation in the negotiations for or terms of the collective bargaining agreements of the local crafts.

The entire record plus an accurate and careful reading of the Articles of Agreement as analyzed above undeniably establishes that the Board has utterly and completely failed to establish "substantial evidence" required to support the conclusion that picketing by the Council was violative of Sec. 8(b)(7)(A) of the Labor-Management Relations Act, as amended (29 U.S.C. § 158(b)(7)(A)), *NLRB* v. *Local* 3 IBEW, 362 F.2d 232 (2d Cir. 1966). Conversely, the

record and the Articles of Agreement show beyond any question that the Council, by picketing at Chambers' construction site to obtain its execution of the Articles of Agreement, had no intent to force or require that Chambers bargain with the Council as the representative of its employees.

Proof of a recognition or an organization object behind picketing is an essential prerequisite to finding an unfair labor practice under Sec. 8(b)(7)(A) of the Labor-Management Relations Act. (29 U.S.C. § 158(b)(7)(A)), *NLRB* v. *Local* 3, *IBEW*, 362 F.2d 232 (2d Cir. 1966). Where, as here, picketing is conducted solely to demand that subcontracted work be handled by subcontractors having executed and current agreements with the various local craft unions having jurisdiction of the subcontractor's employees, the Board has consistently ruled that there is no recognition or organization object and the picketing does not constitute an unfair labor practice, *IBEW, Local* 903, 154 NLRB No. 10, (1965) CCH NLRB 9600; *Bldg. & Construction Trades Council,* 141 NLRB No. 2, 52 LRRM 1269 (1963).

Examining this matter further by way of analyzing the construction industry proviso to Sec. 8(e) of the Labor-Management Relations Act, as amended (29 U.S.C. § 158(e)) it is equally clear that picketing by the Council in this case did not violate Sec. 8(b)(7)(A). The following remarks by then Senator Kennedy establish that Congress, in enacting Sec. 8(e), without exception, intended to preserve the historically recognized legality of building and construc-

ton trades agreements similar to the Articles of Agreement here in contention:

> "The first proviso under new section 8(e) of the National Labor Relations Act is intended to preserve the present state of the law with respect to picketing at the site of a construction project and with respect to the validity of agreements relating to the contracting of work to be done at the site of a construction project . . ."
>
> "Agreements by which a contractor in the construction industry promises not to subcontract work on a construction site to a non-union contractor appear to be legal today. They will not be unlawful under section 8(e). . . ."
>
> "It is not intended to change the law with respect to the judicial enforcement of these contracts, or with respect to the legality of a strike to obtain such a contract."
>
> CONG. REC., Senate — September 3, 1959, p. 1433.

Likewise, the courts have interpreted Sec. 8(e) as preserving the status quo in the building and construction industry and have expressly recognized the validity and legality of building trades agreements requiring that a contractor subcontract work only to employers who have executed current agreements with the local craft unions having jurisdiction over the work performed by their employees, *National Woodwork Mfgrs. Assn.* v. *NLRB*, 386 U.S. 612, 87 S. Ct. 1250 (1967); *El Paso Bldg. and Construction Trades Council* v. *El Paso Chapter, Associated General Contractors of America*, 376 F.2d 797 (5th Cir. 1967).

This clear statement of congressional intent and the legal efficacy granted to subcontractor-oriented agreements by the courts compels the result that picketing to obtain such agreements is not in and of itself violative of Sec. 8(b)(7)(A) (29 U.S.C. 158(b)(7)(A)). Sec. 8(b)(7)(A) was enacted at the same time as Sec. 8(e), and where, as shown above, there is no object of recognition or organization in picketing conducted by a labor organization, Sec. 8(b)(7)(A) in no way limits the language of Sec. 8(e) recognizing the clear validity of building and construction industry subcontractor agreements.

This position is amply supported by analogy to recent decisions of the NLRB. In *Southern California Dist. Council of Hod Carriers,* 158 NLRB No. 28, 62 LRRM 1047 (1966) and *Orange Belt Dist. Council of Painters No.* 48, 153 NLRB No. 80, (1965) CCH NLRB 9551 (supplemental proceeding following remand from 328 F.2d 534 (D.C. Cir. 1964) the Board found that where a subcontractor-oriented building trades agreement was valid under Sec. 8(e), it would be anomolous to hold that economic action to obtain such an agreement was an unfair labor practice under Sec. 8(b)(4) of the Labor-Management Relations Act (29 U.S.C. § 158(b)(4)). Similarly, it would be anomolous to hold that Sec. 8(b)(7)(A), which was adopted at the same time as and makes no reference to Sec. 8(e), proscribes picketing to obtain such an agreement where no recognition or organization object is present.

(B) Chambers had not lawfully recognized any other labor organization as the representative of its employees at the time picketing by the Council took place.

In order for picketing to violate Sec. 8(b)(7)(A) (29 U.S.C. § 158(b)(7)(A)) it must be shown that the employer involved has lawfully recognized another labor organization as the representative of his or its employees, *NLRB* v. *Local* 3, *IBEW*, 362 F.2d 232 (2d. Cir. 1966). The record of the instant case makes no showing that another labor organization had lawfully been recognized by Chambers, thus it fails to meet the "substantial evidence" test requirement applicable in this area (see for example *NLRB* v. *Great Atlantic & Pacific Tea Company*, 340 F.2d 690 (2d Cir. 1965)).

As stated by the Trial Examiner, the Eugene Contractors Association negotiated collective bargaining agreements with four local craft unions (carpenters, laborers, cement masons and ironworkers) during the period January 1, 1965 to July 21, 1965 (Cr. 14). These contracts were allegedly negotiated on behalf of various contractors in the area, including Chambers. At this time, however, Chambers was still bound to a prior agreement executed with the Council on November 29, 1956 (see Resp. Ex. 4). By its terms, that agreement could not be terminated in any given year except by thirty days written notice prior to its November 29 anniversary date. R. A. Chambers first gave this written notice to terminate the agreement on February 4, 1965 through a letter forwarded on his behalf by the Eugene Contractors Association (Tr. 58-

59 and G. C. Ex. 3). This was the only notice the Council received (Tr. 155). Therefore, the agreement (Resp. Ex. 4) was not terminated until November 29, 1965.

The Trial Examiner's statement that the 1956 agreement (Resp. Ex. 4) was abandoned prior to 1965 (Cr. 15) is utterly without foundation. The direct testimony concerning application or enforcement of the agreement by R. A. Chambers himself reveals that questions concerning violations of the agreement had come up and a specific instance had occurred just prior to termination of the agreement in November of 1965 (Tr. 39). Furthermore, to say that Chambers considered the agreement terminated directly conflicts with Chambers' obvious feeling to the contrary that he had to give written notice of his intent to terminate the agreement in order to end its obligation thereunder (see Tr. 59 and C. G. Ex. 3). Chambers expressly stated that when the Eugene Contractors Association executed an agreement with the cement masons in 1965, he felt he was still bound to the terms of the 1956 building trades agreement (Tr. 58).

Assuming for a moment, without admitting, and only for the sake of argument, that the Council was the bargaining representative of Chambers' employees under the 1956 building trades agreement, it was then unlawful for Chambers, through the Eugene Contractors Association, to negotiate and execute agreements recognizing local craft unions as the rep-

resentative of its employees while the 1956 agreement was in effect. Its doing so constituted an unfair labor practice under Secs. 8(a)(1) and 8(a)(5) of the Labor-Management Relations Act, as amended (29 U.S.C. §§ 158(a)(1), 158(a)(5)):

> "The National Labor Relations Act makes it the duty of the employer to bargain collectively with the chosen representatives of his employees. The obligation being exclusive, see Sec. 9(a) of the Act, 29 U.S.C. Sec. 159(a), it exacts 'the negative duty to treat with no other.' Labor Board v. Jones & Laughlin, 301 U.S. 1, 44; and see Virginian Railway Co. v. System Federation, 300 U.S. 515, 548-549." *Medo Photo Supply Corp.* v. *NLRB*, 321 U.S. 678, 64 S. Ct. 830 (1944).

Under these circumstances, the Council, to the exclusion of all other labor organizations, had the right to negotiate and bargain with Chambers over the terms of a new agreement in the fullest sense of those words once the 1956 building trades agreement had expired on November 29, 1965, despite the existence of the previously executed local craft union agreements, *Independent Stave Co., Inc.* v. *NLRB*, 352 F.2d 553 (8th Cir. 1965). Execution of those local craft union agreements did not constitute lawful recognition of another labor organization, and picketing by the Council in April of 1966 to obtain a new agreement could not constitute a violation of 8(b)(7)(A), *NLRB* v. *Local* 3, *IBEW*, 362 F.2d 232 (2d Cir. 1966).

Pursuing this one step further, since execution of the local craft union agreements violated Secs. 8(a)

(1) and 8(a)(5) (29 U.S.C. § 158(a)(1) and 158(a)(5)), and did not cause a break in any alleged representation of Chambers' employees by the Council under the 1956 agreement, picketing by the Council in 1966 constituted only economic pressure to compel Chambers to agree on the terms of the new contract. It was not for an object of obtaining initial recognition as the bargaining representative of Chambers' employees and therefore could not be in violation of Sec. 8(b)(7) (29 U.S.C. § 158(b)(1)), *Local* 612, *Teamsters*, 150 NLRB No. 40, 58 LRRM 1047 (1964).

(C) At the time picketing by the Council took place a question concerning representation could appropriately be raised under Sec. 9(c) of the Labor-Management Relations Act (29 U.S.C. Sec. 159(c)).

For the Council's picketing to constitute a violation of Sec. 8(b)(7)(A) (29 U.S.C. § 158(b)(7)(A)), it must have been the case that a question concerning representation could not appropriately be raised under Sec. 9(c) of the Labor-Management Relations Act, as amended (29 U.S.C. 159(c)), *General Truck Drivers, Warehousemen & Helpers, Locals* 980 & 624, 158 NLRB No. 103, 62 LRRM 1153 (1966). There is no showing in the present case that such a question could not appropriately be raised as respects Chambers' employees.

R. A. Chambers, the only witness testifying as to the matter, made it clear that he could only guess or suppose whether or not any of his employees were un-

ion members in 1965 when contracts were executed with various craft unions through the Eugene Contractors Association (Tr. 129-131). Chambers readily admitted that health, welfare and pension benefits were paid on non-union as well as union employees (Tr. 130) so that this would not indicate to him whether or not any of his employees were union members. He has no policy of union membership as a condition of employment (Tr. 130). His testimony indicated basically that he had no accurate way of knowing the number of union workers in his employ. It is significant to note in this regard that the Trial Examiner's decision nowhere discusses this matter of the status of Chambers' employees while the Board's decision states that all of Chambers' employees were union members (Cr. 34) without citing any place in the record which supports that conclusion. Quite to the contrary, the record fails to show to any degree constituting substantial evidence that a majority of Chambers' employees were union members.

Because Chambers is an employer in the building and construction industry (Tr. 21, 116-117) and because the majority status of its employees respecting union membership had not been established prior to the time it became bound to various local craft union agreements in 1965, its agreements with those unions were in effect pre-hire contracts made valid only by Sec. 8(f) of the Labor-Management Relations Act, as amended (29 U.S.C. § 158(f)), *McLeod* v. *Electrical Workers (IBEW), Local* 3, — F. Supp. —, 57 LRRM 2052 (D.C. S.D. N.Y. 1964); *Alton-Wood*

River Bldg. Trades Council, 144 NLRB No. 31, 54 LRRM 1040 (1963). A Sec. 8(f) collective bargaining agreement is not a bar to the raising of a question concerning representation under Sec. 9(c) (29 U.S.C. § 159(c)), *McLeod* v. *Electrical Workers (IBEW), Local* 3, — F. Supp. —, 57 LRRM 2052 (D.C. S.D. N.Y. 1964); *Island Construction Co.*, 135 NLRB No. 1, (1962) CCH NLRB 10,820, and picketing by the Council, whether or not for an object of recognition or representation, did not, therefore, violate Sec. 8(b)(7)(A) (29 U.S.C. § 158(b)(7)(A)), *Alton-Wood River Bldg. Trades Council*, 144 NLRB No. 31, 54 LRRM 1040 (1963).

In its brief to the Board, the charging party contended that the Council cannot put in issue the question of whether a majority of Chambers' employees were union members because:

1. More than six months have passed since his execution of agreements with local craft unions; and

2. His execution of those agreements raises a rebuttable presumption of their validity (Cr. 31).

This assertion entirely misconstrues the purpose behind the Council's questioning of the majority status of Chambers' employees and the law applicable in this area.

Unlike the situations in *Shamrock Dairy, Inc.*, 119 NLRB No. 134, 41 LRRM, 1216 (1957) and *NLRB* v. *Local* 3, *IBEW*, 362 F.2d 232 (2d Cir. 1966) cited by the charging party (Cr. 31), the Council does not question the majority union status of Chambers' em-

ployees to assert that Chambers has unlawfully recognized the various local craft unions as the bargaining representative of his employees. The Council's sole purpose is simply to show that Chambers contracts with the local crafts, whether lawful or not, were executed under authority of Sec. 8(f) (29 U.S.C. § 158(f)) and therefore were not a bar to raising a question concerning representation under Sec. 9(c) (29 U.S.C. § 159(c)). Under these circumstances, the six-months' limitation applied to cases involving the invalidity of labor agreements and resulting unfair practices and the rebuttable presumption also arising in such situations have no place or significance, (see *Alton-Wood River Bldg Trades Council*, 144 NLRB No. 31, 54 LRRM 1040 (1963) as an example of the Board making inquiry into a union's majority status in a situation analogous to that of the instant case).

CONCLUSION

The Board's decision has created a dilemma which can only be resolved by this Court finding that the Council's picketing did not constitute an unfair labor practice under § 8(b)(7)(A) of the Labor-Management Relations Act, as amended (29 U.S.C. § 158(b)(7)(A)). If the Court finds that the Council had no purpose or object of recognition by or representation of Chambers' employees, then clearly Sec. 8(b)(7)(A) has not been violated. If, on the other hand, a recognition or representation object is found, then, as detailed above, the Court still must find that Chambers

unlawfully recognized another labor organization as the representative of its employees and that a question concerning representation could appropriately be raised under Sec. 9(c) of the Labor-Management Relations Act, as amended (29 U.S.C. § 159(c)). Likewise in this event, Sec. 8(b)(7)(A) (29 U.S.C. § 158(b)(7)(A)) has not been violated. The decisions of the Trial Examiner and the National Labor Relations Board must be reversed.

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CERTIFICATE OF COUNSEL

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

PAUL T. BAILEY
Of Attorneys for the Petitioner

APPENDIX "A"

Sec. 8(b)(7)(A), Labor-Management Relations Act, as amended (29 U.S.C. Sec. 158(b)(7)(A)):

"Sec. 8(b) It shall be an unfair labor practice for a labor organization or its agents

* * * * *

"(7) to picket or cause to be picketed, or threaten to picket or cause to be picketed, any employer where an object thereof is forcing or requiring an employer to recognize or bargain with a labor organization as the representative of his employees, or forcing or requiring the employees of an employer to accept or select such labor organization as their collective bargaining representative, unless such labor organization is currently certified as the representative of such employees:

(A) where the employer has lawfully recognized in accordance with this Act any other labor organization and a question concerning representation may not appropriately be raised under section 9(c) of this Act."

Sec. 8(e), Labor-Management Relations Act, as amended (29 U.S.C. Sec. 158(e)):

"Sec. 8(e) It shall be an unfair labor practice for any labor organization and any employer to enter into any contract or agreement, express or implied, whereby such employer ceases or refrains or agrees to cease or refrain from handling, using, selling, transporting or otherwise dealing in any of the products of any other employer, or to cease doing business with any other

person, and any contract or agreement entered into heretofore or hereafter containing such an agreement shall be to such extent unenforceable and void: *Provided*, That nothing in this subsection (e) shall apply to an agreement between a labor organization and an employer in the construction industry relating to the contracting or subcontracting of work to be done at the site of the construction, alteration, painting, or repair of a building, structure, or other work: *Provided further*, That for the purpose of this subsection (e) and section 8(b)(4)(B) of the terms 'any employer,' 'any person engaged in commerce or in industry affecting commerce,' and "any person' when used in relation to the terms 'any other producer, processor, or manufacturer,' 'any other employer,' or 'any other person' shall not include persons in the relation of a jobber, manufacturer, contractor, or subcontractor working on the goods or premises of the jobber or manufacturer or performing parts of an integrated process of production in the apparel and clothing industry; *Provided further*, That nothing in this Act shall prohibit the enforcement of any agreement which is within the foregoing exception."

Sec. 8(f), Labor-Management Relations Act, as amended (29 U.S.C. Sec. 158 (f)):

"Sec. 8(f) It shall not be an unfair labor practice under subsections (a) and (b) of this section for an employer engaged primarily in the building and construction industry to make an agreement covering employees engaged, (or who, upon their employment, will be engaged in the building and construction industry with a labor organization of which building and construc

tion employees are members (not established, maintained, or assisted by any action defined in section 8(a) of this Act as an unfair labor practice) because (1) the majority status of such labor organization has not been established under the provisions of section 9 of this Act prior to the making of such agreement, or (2) such agreement requires as a condition of employment, membership in such labor organization after the seventh day following the beginning of such employment or the effective date of the agreement, whichever is later, or (3) such agreement requires the employer to notify such labor organization of opportunities for employment with such employer, or gives such labor organization an opportunity to refer qualified applicants for such employment, or (4) such agreement specifies minimum training or experience qualifications for employment or provides for priority in opportunities for employment based upon length of service with such employer, in the industry or in the particular geographical area: *Provided*, That nothing in this subsection shall set aside the final proviso to section 8(a)(3) of this Act: *Provided further*, That any agreement which would be invalid, but for clause (1) of this subsection, shall not be a bar to a petition filed pursuant to section 9(c) or 9 (e)."

Sec. 9(c) of the Labor-Management Relations Act, as amended (29 U.S.C. Sec. 159(c)):

"(c)(1) Wherever a petition shall have been filed, in accordance with such regulations as may be prescribed by the Board—

"(A) by an employee or group of employees or any individual or labor organization acting in

their behalf alleging that a substantial number of employees (i) wish to be represented for collective bargaining and that their employer declines to recognize their representative as the representative defined in section 9(a), or (ii) assert that the individual or labor organization, which has been certified or is being currently recognized by their employer as the bargaining representative, is no longer a representative as defined in section 9(a); or

"(B) by an employer, alleging that one or more individuals or labor organizations have presented to him a claim to be recognized as the repsentative defined in section 9(a): the Board shall investigate such petition and if it has reasonable cause to believe that a question of representation affecting commerce exists shall provide for an appropriate hearing upon due notice. Such hearing may be conducted by an officer or employee of the regional office, who shall not make any recommendations with respect thereto. If the Board finds upon the record of such hearing that such a question of representation exists, it shall direct an election by secret ballot and shall certify the results thereof."

APPENDIX "B"

List of Exhibits Referred to
in Petitioner's Opening Brief

Exhibit	*Offered*	*Identified*	*Received*
Gen. Counsel # 3	Tr. 7	Tr. 4-7	Tr. 9
Gen. Counsel #17	Tr. 17	Tr. 10	Tr. 18
Gen. Counsel #18	Tr. 17	Tr. 13	Tr. 18
Respondent #4	Tr. 114	Tr. 114	Tr. 115